

Surveillance, Security, Privacy: What direction to reach the end of the tunnel?

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While states across Europe and the world continue to draft and enact new legal frameworks and policies relating to governmental surveillance, it remains highly questionable whether society moves in the right direction. (Online) privacy seemingly is more endangered than ever before. Traditional safeguards such as judicial oversight of measures seem to become less popular with members of the executive forces who state they need to be able to act quicker and need more information. How to square the circle?



Governmental Surveillance – the state of play in 2018

The current discussion on governmental surveillance is heavily influenced by the revelations of Edward Snowden which started to get public attention in June 2013. Asked why he chose to reveal critical information relating to the national security of the United States and its allies, he replied in an interview of The Guardian newspaper: “I don’t want to live in a society that does these sort of things ... I do not want to live in a world where everything I do and say is recorded. That is not something I am willing to support or live under.” What followed was considerable discussion in various fora. The United Nations, the European Parliament and many other national institutions (eg. in Germany, USA) setup specific roles, bodies and meetings to search for an appropriate response. As an excellent report of the EU fundamental rights agency of October 2017 points out, there are only very few states in Europe who have not seen a significant overhaul of the legal framework relating to governmental surveillance in the years since the revelations.

Therefore, can we conclude that Snowden has made his point and that states in Europe and across the world have responded appropriately and effectively? Is governmental surveillance in 2018 in developed and civilized countries only possible if specific laws are in place which respond to democratic needs and allow for surveillance measures which are limited to what is necessary and proportionate? As a recently held referendum on the topic in the Netherlands and much controversy on a new legal framework in Austria suggests, the answer is: No.

What should we aim for?

Undoubtedly, the challenges for law enforcement agencies and security and information services have become more complex with the transition to the Digital Age. Information can be exchanged and shared in an instant, beyond borders and very secure by using technologies such as encryption. At the same time, threat patterns got more complex and international. It is understandable that national security institutions feel intimidated by this new situation ("Going dark") and that many citizens start to feel unsafe and insecure.

However, it is particularly times of rapid change where it matters most to stick to the pillars that form the core of society. In Europe these are democracy, the rule of law and human rights. Specifically relating to human rights and privacy, we often hear politicians and executives state that they are not absolute and "balancing" is required. While it is certainly true that the right to privacy is a "non-absolute" right – which by the way also applies to the human right to life in a safe and secure environment – it is important to remember that balancing is not done for its own sake. Thus, what should we aim for?

It is submitted, that article 1 of the Charter of the Fundamental Rights of the EU gives an important part of the answer when it states: "Human dignity is inviolable. It must be respected and protected." Hence, when we aim at providing safety and security for a society which has human rights at its core, we must do so in a way that promotes human dignity. Living in a dignified society is not possible without the right to privacy – regardless of how safe or unsafe it might be. In conclusion, what we need is both: Privacy AND Security.

What are the options on the table to get there?

While national security is still in the domain of nation states and security institutions work differently in each country for often important reasons, particularly electronic surveillance is an international affair at its core. The technology used, the concerning threats (such as terrorism, organized crime or illegal migration) and the resources needed (expertise, manpower, information) to effectively address this topic make more international cooperation and collaboration absolutely necessary. However, such cooperation and collaboration is only possible with an increased and shared understanding of the situation. In this regard, the recently updated European Union data protection framework does not help, since the EU does not have the competences to interfere in such matters (see Art 4 par. 1, Art par. 2 TEU). Whether and how much a revision of the data protection regime of the Council of Europe will contribute to this matter remains to be seen at the time of writing since the process is still not completed.

Nevertheless, baby steps are made in the direction which promises to lead to the light at the end of the tunnel: Craving more legal certainty executives of large corporations such as Microsoft propose to discuss a "Digital Geneva Convention". The author of this piece has been involved in the creation of a Working-Draft Legal Instrument on Government-led Surveillance and Privacy which has been presented to the Human Rights Council of the United Nations in March 2017 by UN Special Rapporteur on the right to privacy Joseph Cannataci. It has been developed in cooperation with the EU-funded MAPPING project. However, only time and more discussion can tell whether these initiatives bear fruit. The

substance of such proposals is still heavily debated and how any enforcement or control of a more common approach on an international level could work remains completely open at this point.

Conclusion

Both, security and privacy are highly complex concepts which are heavily transformed by the transition to the digital age. Nevertheless, it seems unlikely that this transformation will result in a more dignified environment if international exchange and cooperation on the issues is not increased and reinforced. While states historically and for the foreseeable future will continue to be the anchors of security, the European experience after the second world war shows that nations need to be checked effectively on an international level to properly respect, protect and promote human rights. Unfortunately, it seems we have forgotten this lesson which made us successful in the past. Now, we face an uncertain future with legal frameworks that are both: ineffective and inappropriate.

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